123-345

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 1083.

THE UNITED STATES, APPELLANT,

vs.

ROBERT W. ALLEN.

APPEAL FROM THE COURT OF CLAIMS.

FILED SEPTEMBER 30, 1887.

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1 I.—*Petition.*

In the Court of Claims.

ROBERT W. ALLEN
vs.
THE UNITED STATES. } No. 15591.

To the honorable the judges of the Court of Claims:

The petition of Robert W. Allen respectfully shows to your honors:

That he is a citizen of the United States and an officer of the Navy thereof, to wit, a paymaster.

That under the naval appropriation act of August 5th, 1882 (22 Stats., 287), and March 3d, 1883 (22 Stats., 473), your petitioner had a good and valid claim against the United States for longevity pay from —— 18—, to ——, 18—, on account of services rendered the Government prior to his last entry in the Navy from ——, 18—, to ——, 18—.

2 That a portion of said claim was allowed by the late Second Comptroller of the Treasury, Hon. W. W. Upton, and paid to your petitioner, but that the said Upton deducted from the amount justly due your petitioner on said claim the sum of $——, on account of sums alleged to have been unlawfully paid him from ——, 186–, aforesaid, to June 30th, 1870, and allowed by former accounting officers of the Treasury for commutation of quarters, furniture, lights, and fuel, under section 4 of the act of Congress approved April 17th, 1866 (14 Stats., 38), as construed by the Secretary of the Navy and said accounting officers; and that said Upton declined to allow the further sum of $——, which your petitioner says was justly due him on said claim under said acts of 1882 and 1883 and said act of 1866 as so construed.

3 That the present Second Comptroller of the Treasury, Hon. I. H. Maynard, has decided in the case of Louis R. Chester that such deductions were unlawful, but that he has also decided that he has not the power or authority to reopen the settlement which was made by his predecessor in petitioner's case; wherefore he brings this suit and prays judgment in the sum of $3,000.00.

Your petitioner says that he is the sole owner of this claim and has never disposed of the same, or any part thereof, to any person; that he is justly entitled to the amount thereof, after allowing all just credits and offsets; that he has at all times borne true allegiance to the Government of the United States, and has never voluntarily aided, abetted, or given encouragement to rebellion against said Government, and that he believes the facts stated in this petition to be true.

Your petitioner has appointed John Paul Jones, of Washington, D. C., his attorney for the prosecution of this claim.

ROBERT W. ALLEN,
By JOHN PAUL JONES, *Attorney.*

Subscribed and sworn to before me this 17 day of March, 1887.

JOHN RANDOLPH,
Asst. Clk. C. C.

1

I.—*Petition.*

In the Court of Claims.

ROBERT W. ALLEN
vs.
THE UNITED STATES. } No. 15591.

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Your petitioner has appointed John Paul Jones, of Washington, D. C., his attorney for the prosecution of this claim.

ROBERT W. ALLEN,
By JOHN PAUL JONES, *Attorney.*

Subscribed and sworn to before me this 17 day of March, 1887.

JOHN RANDOLPH,
Asst. Clk. C. C.

II.—*General traverse.*

In the Court of Claims of the United States. December term, A. D. ——.

ROBERT W. ALLEN
vs.
THE UNITED STATES. } No. 15591.

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

ROBERT A. HOWARD,
Assistant Attorney-General.

5 III.—*Findings of fact and conclusion of law.*

Court of Claims.

ROBERT W. ALLEN
v.
THE UNITED STATES. } No. 15591.

FINDINGS OF FACT.

This case having been heard by the Court of Claims, the court, upon the evidence, find the facts to be as follows:

First. Robert W. Allen is an officer of the Navy, to wit, a paymaster thereof; and he has served as such since the 1st day of February, 1868.

Second. In the adjustment of his claim for the benefits of the act of March 3, 1883, the accounting officers of the Treasury deducted from the settlement made in his favor the sum of $1,112.75, being the amount paid him, under General Order No. 75, issued by the Secretary of the Navy, May 23, 1866.

Third. Said accounting officers refused in the settlement of said claim to allow claimant the further sum of $206.04, which said amount would have accrued to him, if he had been credited, at that time, with his service prior to the date of his commission as paymaster.

Fourth. The following is General Order No. 75, referred to in finding II:

[General Order No. 75.]

NAVY DEPARTMENT, *May* 23, 1866.

Congress having, in view of the call for increased compensation for officers of the Navy, repealed the law which prohibited any allowance to

them "for rent of quarters or to pay rent for furniture, or for lights and fuel, &c.," the Department, in order to prevent a recurrence of the irregularities, abuses, and arbitrary allowances which occasioned the prohibition, deems it proper to establish a fixed rate of compensation in lieu of the extra allowances which were prohibited by the law now repealed. Accordingly, from and after the first day of June proximo, officers who are not provided with quarters on shore stations will be allowed a sum equal to 33⅓ per centum of their pay in lieu of all allowances, except for mileage or traveling expenses under orders; and those provided with such quarters, 20 per centum of their pay in lieu of said allowances.

The act of March 3, 1865, having increased the pay of midshipmen and mates, the allowances hereby authorized will not be extended to them.

GIDEON WELLES,
Secretary of the Navy.

CONCLUSION OF LAW.

On the foregoing facts the court find, as conclusion of law, that the claimant recover the sum of $1,318.79.

6 IV.—*Opinion of the court.*

DAVIS, J., delivered the opinion of the court:

The facts in this case are precisely similar to those in the cases of Philbrick, decided by this court at the last term (21 Ct. Cls., 511) and affirmed on appeal by the Supreme Court (119 U. S. —). It is urged that one point in the Philbrick case, which is also presented in the case at bar, was not in fact considered by the court, although judgment was entered here and affirmed above for the full amount claimed.

General Order No. 75, issued by the Secretary of the Navy, May 23, 1866, fixed the allowance to officers of the Navy for rent of quarters, for furniture, for light, and for fuel. This order was held by the accounting officers to be unauthorized, and in computing claimant's longevity pay they deducted the sum of $1,112.75 on account of payments made him in lieu of commutation of quarters, &c., between the date of his commission as paymaster and June 30, 1870. This deduction is not now in question, the decision in Philbrick's case having clearly decided it to be erroneous. A further sum of two hundred and six dollars and four cents ($206.04) would have accrued to claimant on account of the allowance for commutation of quarters, &c., between the said dates had he then been given credit for prior service. That is, the percentage allowed by the Secretary of the Navy, under Order No. 75, was computed upon the pay then in fact being received by the claimant, and it is contended on his behalf that as he is entitled to the benefits of the longevity pay act of March 3, 1883, the further sum of $206.04 would have accrued to him under said general order if he had at that time been credited with his prior service. Stated in another way, the allowance should be calculated by taking the prescribed percentage, not of the pay actually being received by claimant at the time the order was in force, but of the pay which he has since been allowed under the longevity pay act. (Rockwell v. The United States, *supra*, ——).

Parallel facts were before the court in the Philbrick case, where the

claim was made up of two items, the same in character, the first for $169.50, the second for $45.38, corresponding to the amounts here of $1,112.75 and $206.04. The Supreme Court affirmed Philbrick's right to the total sum claimed by him, but it is urged that the point now made as to the second item was not pressed upon that tribunal, and did not receive their consideration. In support of this position we are referred to the following statement in the opinion: "In respect to the item of $169.50, which is the only one disputed on this appeal," &c.

The defense allege that before the Supreme Court they contended only that General Order No. 75 was unauthorized and illegal; that if the position of the Government had been sustained, then the whole controversy would have ended; whereas the converse of the proposition is not true, and the legality of the order being established, it does not follow that the claimant is entitled to the second item claimed by him.

There is no dispute as to the fact that if claimant, between February 1, 1868, and June 30, 1870, when General Order 75 ceased to exist, had been given credit for prior service, and the allowance percentage had been calculated upon this increased sum, he would have received what he now claims. This was also true in the Philbrick case. The petition in that case claimed separately the item like that now in dispute; claimant's brief in both courts contained a statement in regard to it, as did defendants' requests here. The fifth finding of fact made by this court reads as follows:

"If claimant had been credited on his warrant as an officer of the regular Navy with his prior service as a volunteer, the sum of $25.46 would have accrued to him after deducting internal-revenue tax on account of the allowance authorized by the general order between November 12, 1869, and June 30, 1870, in addition to the sums deducted in the settlement of September 8, 1884."

7 On appeal defendants assigned as error—

"1. In deciding as a conclusion of law, based on the facts as found, that the claimant is entitled to recover the money withheld by the accounting officers in the settlement of his account, to wit, the sum of $214.88."

Finally, the Supreme Court, in their opinion, alluded to the disputed item, and affirmed the judgment entered here for the total amount. We are therefore of opinion that the question was considered by the Supreme Court, and that they reached the conclusion that, the legality of the general order once established, both items of the claim should be allowed.

Judgment for claimant for $1,318.79.

8 V.—*Final judgment.*

At a Court of Claims held in the city of Washington, D. C., on the 31st day of May, A. D. 1887, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the claimant, and do order, adjudge, and decree that the said Robert W. Allen do have and recover of and from the United States the sum of thirteen hundred and eighteen $\frac{79}{100}$ dollars ($1,318.79).

9 VI.—*Application of defendants for, and allowance of, appeal.*

In the Court of Claims of the United States. Dec. term, 1886–'7.

ROBERT W. ALLEN
vs.
THE UNITED STATES. } No. 15591.

From the judgment rendered in the above-entitled cause on the 31st day of May, 1887, in favor of claimant, the defendants, by their Attorney-General, on the 1st day of August, 1887, make application for, and give notice of, an appeal to the Supreme Court of the United States.

ROBERT A. HOWARD,
Ass't Attorney-General.

Filed and allowed in vacation, August 1, 1877.

WILLIAM A. RICHARDSON,
Chief Justice.

10 VIII.—*Certificate.*

In the Court of Claims.

ROBERT W. ALLEN
vs.
THE UNITED STATES. } No. 15591.

I, Archibald Hopkins, chief clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusion of law thereon, of the final judgment, and of the application for, and allowance of, an appeal.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington this 23d day of August, 1887.

[SEAL.] ARCHIBALD HOPKINS,
Ch. Clerk Court of Claims.

11 (Indorsement on cover:) No. 1083. The United States, appellant, vs. Robert W. Allen. Court of Claims. Filed September 30, 1887.

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In the Supreme Court of the United States.

OCTOBER TERM, 1887.

THE UNITED STATES, APPELLANT,
vs.
ROBERT W. ALLEN.
No. 1083.

STATEMENT, ASSIGNMENT OF ERRORS, AND BRIEF FOR APPELLANT.

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

THE UNITED STATES, APPELLANT,
vs.
ROBERT W. ALLEN. } No. 1083.

STATEMENT, ASSIGNMENT OF ERRORS, AND BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from a judgment of the Court of Claims, rendered in favor of Robert W. Allen, the claimant, for the sum of $1,318.79.

Claimant is a paymaster in the Navy, and has been since 1868. In the adjustment of his claim for benefits accruing to him under the clause in the naval appropriation act of 1883, known as the *Longevity Pay Act* (22 Stat. L., p. 473), the sum of $1,112.75, being the amount paid him under General Order No. 75, issued by the Secretary of the Navy May 23, 1886, was deducted from the settlement made in his favor.

The following is a copy of said general order:

GENERAL ORDER, No. 75. } NAVY DEPARTMENT, *May* 23, 1866.

Congress having, in view of the call for increased compensation to officers of the Navy, repealed the law which prohibited any allowance to them "for rent of quarters or to pay rent for furniture, or for lights or fuel, &c., &c.," the Department, in order to prevent a recurrence of the irregularities, abuses, and arbitrary allowances which occasioned the prohibition, deems it proper to establish a fixed rate of compensation in lieu of the extra allowances which were prohibited by the law now repealed. Accordingly, from and after the first day of June proximo, officers who are not provided with quarters on shore stations will be allowed a sum equal to 33⅓ per centum of their pay in lieu of all allowances, except for mileage or traveling expenses under orders; and those provided with such quarters, 20 per centum of their pay in lieu of said allowances.

The act of March 3, 1865, having increased the pay of midshipmen and mates, the allowance hereby authorized will not be extended to them.

GIDEON WELLES,
Secretary of the Navy.

This deduction, in view of the decision in *Philbrick's Case* (120 U. S., 52), was erroneous. The judgment, therefore, of the court below to the amount of $1,112.75 is not disputed.

But it is contended by claimant that the allowance for commutation of quarters, etc., under General Order No. 75, was part of the pay of officers of the Navy, and that, as he is entitled to the benefits of the longevity pay act of March 3, 1883, *supra*, the further sum of $206.04

would have accrued to him under such general order when in force, had he at that time been credited with his prior service. That is to say, it is claimed that the percentage of pay allowed as commutation for quarters, etc., under said general order should be made, not upon the pay actually received by claimant under existing laws at the time the payment was made and the order in force, but also upon the increased pay which he has since been allowed under the longevity pay act of 1883, upon which basis the further sum alleged to be due claimant would be, according to the calculation of the accounting officers of the Treasury, $206.04. Parallel facts were before this court in the case of *Philbrick* vs. *U. S.* (21 C. C., 511; 120 U. S., 52).

In the Philbrick Case the amount in controversy was made up of two items, viz: $169.50 (like $1,112.75 in the present case), allowed and paid claimant for commutation of quarters, etc., and $45.38 (like $206.04 in the present case), the additional amount claimant would have been paid had the additional pay accruing under the act of 1883 been then authorized, and commutation for quarters, etc., been regarded as part of the pay of such officer.

It was urged in the court below, on the part of the defendant, that the amount allowed for commutation of quarters, etc., under General Order No. 75, *supra*, was no part of the pay of the officer; that the pay to which the officer was then entitled was simply adopted as a basis upon which a calculated percentage would denote a fair amount at which such commutation should be made.

It was contended in the court below by claimant that this question had been considered and decided in the Su-

preme Court in the case of *Philbrick* vs. *United States*, *supra*; and that, under the authority of that case, judgment should be rendered in his favor for the whole amount claimed.

This view of the case was sustained by the court below, and judgment for the whole amount, as claimed, rendered.

That the point at issue was considered by this court in such case is denied on the part of the United States.

ASSIGNMENT OF ERRORS.

The court below erred:

(1) In finding, as a conclusion of law, that the claimant should recover the sum of $1,318.79.

(2) In ordering, adjudging, and decreeing "that the said Robert W. Allen do have and recover of and from the United States the sum of $1,318.79."

(3) In deciding that the sum of $206.04, "the allowance calculated by taking the prescribed percentage under authority of said General Order No. 75, not of the pay actually received by claimant at the time such order was in force, but of the pay which he has since been allowed under the longevity pay act," should have been awarded claimant by the accounting officers.

(4) In deciding that the merits of both items of this claim, to wit, $1,112.75 and $206.04, had been considered by this court in *Philbrick* vs. *The United States* (120 U. S., 52), and that this "court reached the conclusion that the legality of the general order (No. 75) once established, both items of the claim should be allowed."

BRIEF OF ARGUMENT.

The facts presented to the court in the case of *Philbrick* vs. *United States* (120 U. S., 52) and the case at bar are of like character.

In the decided case it was contended on the part of the defendant that General Order No. 75, of the Secretary of the Navy, *supra*, was unauthorized and illegal. If the position of the Government had been sustained, any question as to either items of the account would have been settled, for the reason that, had the general order been declared illegal and unauthorized, any claims made by virtue thereof would necessarily fall.

But the converse of the proposition is not true.

The basis of the claim to the different items is not the same. The claim for $169.50 in the case of Philbrick and $1,112.75 in the case at bar bear only an incidental relation to the construction of the longevity pay act of 1883 (22 Stat. L., 474). During the operation of said general order the accounts of officers with such allowances included in the settlement were paid, the validity of the order, the allowance, and settlement not being then questioned. On the 3d of March, 1883, what is known as the longevity pay act was passed as a clause in the naval appropriation bill of that year (22 Stat. L., 473), as follows:

> All officers of the Navy shall be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer Navy, or both, and shall receive all the benefits of such actual service in all respects and in the same manner as if all

said service had been continuous, and in the regular Navy, in the lowest grade having graduated pay held by such officer since last entering the service.

It was admitted by the accounting officers of the Treasury that claimant was entitled to the benefits of this act, but it was claimed that said General Order No. 75 was unauthorized and invalid, and payments made thereunder were erroneous. The amount of such payments were therefore deducted from the amount admitted to be due claimant in the application to him of the longevity pay act of 1883, *supra*.

The right of the accounting officers to make such deduction was considered by this court in the case of Philbrick, *supra*.

Harlan, J., rendering the opinion of the court, states that the item of $169.50 is the only one disputed in the appeal.

The opinion of the court was to the effect that said general order "was in accordance with the construction which the Executive Departments, for many years prior to 1835, placed upon the various statutes relating to the naval establishment and defining the power of the Secretary of the Navy. A contemporaneous construction by the officers upon whom was imposed the duty of executing those statutes is entitled to great weight; and since it is not clear that that construction was erroneous, it ought not now to be overturned. (See *Hahn* vs. *United States* (107 U. S., 105), *Brown* vs. *United States* (113 U. S., 571), and authorities cited in each case.")

It is not denied that the validity of the claim of $45.38 was before this court on appeal in the case of *Philbrick* v.

United States, supra, but the arguments of the counsel on both sides were especially directed to the consideration of the validity of said General Order No. 75. Although judgment was rendered by this court for the full amount of the claim embraced in both items, the peculiarities of the smaller item were not discussed by counsel nor referred to in the opinion rendered.

The smaller items of the account, viz, $45.38, in the Philbrick Case, and $206 04 in the case at bar, present other and widely different questions from those considered by this court in the Philbrick Case.

The question there considered involved not only the validity of General Order 75, but whether, after payment of the amount allowed claimant, the Second Comptroller had authority to open the claim upon the ground of error arising from mere mistake of law, or whether errors in accounts so stated, closed and settled by payment, can be corrected otherwise than by regular judicial proceedings instituted for that purpose by the United States. The sum of $206.04 in the case at bar is not for deduction on account of money paid by virtue of such General Order No. 75, nor an allowance under and by virtue of the longevity pay act of 1883, *supra*. That claimant is entitled to such allowance is denied.

The allowance for commutation of quarters, etc., was no part of the pay of naval officers. The pay of naval officers is fixed by statute. The Secretary of the Navy has no power to increase or diminish it. The powers of all officers from the President down are limited by law (*Floyd's Acceptances*, 7 Wall., 677; *United States* vs. *Alex-*

ander, 110 U. S., 329; *Moffatt* vs. *United States*, 112 U. S., 32). In the case of *The United States* vs. *Symonds* (21 C. C., 152) Weldon, J., says: "The pay of a public officer, whether civil or military, must be regarded as a subject on which Congress will necessarily legislate, unless, in the use of the power, they may impair the efficiency of a Department in the exercise of functions peculiarly executive." Harlan, J., in delivering the opinion of this court, same case, on appeal (120 U. S., 49), says: "Congress certainly did not intend to confer authority on the Secretary of the Navy to diminish an officer's compensation, as established by law, by declaring that to be shore service which was in fact sea service, or to increase his compensation by declaring that to be sea service which was in fact shore service."

There is a distinction between the amount of the salary or pay of an officer and legitimate expenses incurred by him in the service of the Government. It has been and is the policy of the Government to pay for actual and necessary expenses incurred. It was the custom in the Navy prior to 1835 to pay for rent of quarters or for rent of furniture, or for lights and fuel, etc. By the general order No. 75, of May 23, 1866, instead of paying the actual expenses incurred for rent of quarters, etc., the allowance of a fixed sum was substituted in lieu thereof, such sum being a percentage upon the amount of pay to which the officer was entitled. The validity of such order is affirmed in the Philbrick Case. Harlan, J., says: "The power of the Secretary of the Navy to establish rules for the apportionment of the sums set apart by Congress in

gross for such objects as those involved in the allowances here in dispute having been frequently exercised prior to 1835 without objection by the legislative branch of the Government, and since that act, as well as the one of 1866, is an implied recognition of the practice established in the Navy Department prior to 1835, we are not disposed at this late day to question the validity of the order of May 23, 1866."

It is not expressed or implied in the opinion rendered in the Philbrick Case that the allowance paid under Order No. 75 should be regarded as salary. The power of the Secretary of the Navy to increase or diminish the pay of naval officers is not recognized. The extreme limit of the opinion is in the recognition of the power of the Secretary of the Navy "to establish rules and regulations for the apportionment of the sums set apart by Congress in gross for such objects as those involved in the allowances" for quarters, etc. The pay of the officer was made from one appropriation; such allowances from another appropriation. In making such allowance the statutory pay was regarded by the Secretary of the Navy as a convenient basis upon which to calculate a percentage.

The allowance of 33⅓ per cent. of the pay then adjusted was in lieu of actual expenses incurred. Such allowance, to be justified, must have been warranted by the appropriation.

It is not pretended that the actual expenses of the officer were not covered by the allowance. Expenses not included in the general order No. 75, such as traveling ex-

penses, mileage, etc., might with equal reason be regarded as the pay of the officer, as commutation for quarters, etc.

It is respectfully submitted that the judgment in this case should be reduced to $1,112.75.

A. H. GARLAND,
Attorney-General.
ROBERT A. HOWARD,
Assistant Attorney-General.
F. P. DEWEES,
Assistant Attorney.

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IN THE

Supreme Court of the United States.

October Term 1887.

THE UNITED STATES, APPELLANTS,
vs.
ROBERT W. ALLEN, APPELLEE. } No. 1083.

Appeal from the Court of Claims.

BRIEF FOR APPELLEE.

The question in this case is whether appellee is entitled, in the settlement of his account under what is known as the longevity-pay clause of section 1 of the Naval Appropriation Act of March 3, 1883, (22 Stats., 473,) to the longevity increment on his 33⅓ per cent. of salary allowed in lieu of fuel, quarters, &c., under Navy General Order No. 75, of May 23, 1866.

The case, so far as it goes, is identical with that of United States *v.* Philbrick, in which the judgment of the Court of Claims was affirmed by this Court. (120 U. S., 52.)

The dispute here is whether the smaller of the two items which went to make up that judgment was especially considered by the Court, and, if not, whether it does not stand on a different footing from the larger item. It being conceded that the accounting officers had no authority to deduct the larger item—representing money actually received from 1866 to 1870, under General Order 75—it is contended that it does not follow that the smaller item should now be allowed.

In Philbrick's case the Court expressly declined to decide whether money paid in mistake of law could be deducted from a subsequent account, but rested its decision on the original validity of General Order No. 75, as authorized by the act of April 17, 1866. That order being declared valid and legal, it follows that, whatever benefit Philbrick and the appellee would have received from the order if the act of 1883 had been in force when it was issued, must now be given them.

It is perfectly clear that, if the act of 1883 had been in force in 1866, the salaries of Philbrick and the appellee would have been larger than they actually were by reason of the credit for prior service, which the act of 1883 now directs to be given them. Their salaries being larger, the 33⅓ per cent. allowance would have been correspondingly larger, and they must now receive the difference in that item; for the act of 1883 allows them "all the benefits" of credit for prior service, and not, as appellants contend, only the benefits of increased pay proper. It is unnecessary, therefore, to argue the question elaborated in appellant's brief, whether the 33⅓ per cent. allowance was part of appellee's pay. It is only necessary to show that it was one of the "benefits" which would have been affected by longevity credit.

Philbrick's case is full authority, and the judgment should be affirmed.

JOHN PAUL JONES,
ROB'T B. LINES,
For Appellee.